

NOT DESIGNATED FOR PUBLICATION  
**ARKANSAS COURT OF APPEALS**

DIVISION III

No. CACR 07-764

JUSTIN BRYAN VANSICKLE  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

Opinion Delivered MARCH 12, 2008

APPEAL FROM THE CLEVELAND  
COUNTY CIRCUIT COURT,  
[CR-06-106-5]

HONORABLE LARRY CHANDLER,  
JUDGE

DISMISSED

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**JOHN B. ROBBINS, Judge**

Appellant Justin Bryan Vansickle appeals from a decision of the Cleveland County Circuit Court denying his motion to transfer his criminal case to juvenile court. Because Mr. Vansickle failed to file a timely notice of appeal from the trial court's most recent final order, we lack jurisdiction and the appeal must be dismissed.

These proceedings were instituted on August 6, 2004, when Mr. Vansickle, who was then sixteen years old, was charged in Columbia County Circuit Court with the first-degree murder of Mark Byrd. The murder was alleged to have occurred while Mr. Byrd was asleep in his home in the early morning hours of May 12, 2004. In March 2006, a Columbia County jury was unable to reach a verdict and a mistrial was declared. On September 1, 2006, venue was transferred to Cleveland County. A second amended information was filed

in Cleveland County on February 15, 2007, charging Mr. Vansickle with capital murder and two counts of residential burglary.

On April 4, 2007, Mr. Vansickle filed a motion to transfer to juvenile court, and the State filed a response opposing appellant's motion. A transfer hearing was held on April 12, 2007, and the only witness to testify was Juvenile Ombudsman Scott Tanner. Mr. Tanner testified about the extended juvenile jurisdiction (EJJ) provision enacted by the General Assembly in 1999. *See* Ark. Code Ann. § 9-27-501, et seq. (Supp. 2007). Mr. Tanner stated that under the structure of EJJ, the trial court maintains jurisdiction over an individual until he reaches the age of twenty-one. Moreover, the EJJ permits the trial court to impose an adult sentence, which in this case could include a life sentence. Upon consideration of Mr. Vansickle's prior public intoxication adjudication, Mr. Tanner speculated that Mr. Vansickle would benefit from the programs available in the Division of Youth Services.

On April 17, 2007, the trial court entered an order denying Mr. Vansickle's motion to transfer, addressing each of the ten factors listed in Ark. Code Ann. § 9-27-318(g) (Supp. 2007). On April 23, 2007, the State filed a motion to reopen the juvenile transfer hearing for supplemental testimony for the court's consideration. The State's motion recited:

1. That a hearing was held on April 12, 2007, regarding the Defendant's Motion to Transfer to Juvenile Court.
2. That the Court has since entered an order denying the Defendant's Motion for failure to meet the burden of proof.
3. That the State's position is that the Court's ruling is certainly right and appropriate based upon a plain reading of the Arkansas code.
4. However, to ensure that the Defendant's rights are met beyond the minimum statutory requirements, the State hereby requests that the Court re-open the

hearing and permit additional testimony of State's witness Jake Jagers for the purpose of more clearly delineating the facts for the record.

5. That the deposition of Jake Jagers has already been scheduled in this matter for Tuesday, April 24, and the parties have had adequate notice and reason to prepare for the hearing. That re-opening the hearing does not prejudice the defendant in any way.

Also on April 23, 2007, Mr. Vansickle filed a notice of appeal from the trial court's April 17, 2007, order.

On April 24, 2007, testimony was taken from State's witness Jake Jagers, and appellant fully exercised his right to cross-examine Mr. Jagers. In his testimony, Mr. Jagers stated that he and Mr. Vansickle had been drinking at a party on the night of May 11, 2004, and later went to Mark Byrd's home in Mr. Vansickle's truck. According to Mr. Jagers, appellant told him that he had stolen guns from the residence on a previous occasion. On this occasion, Mr. Vansickle entered the house and came back to tell Mr. Jagers to come on in, and he complied. Mr. Jagers stated that while inside the residence Mr. Vansickle handed him a shotgun. Then, while standing in a hallway, Mr. Jagers saw Mr. Vansickle lunge at the victim, who was lying in bed, and stab him with a knife. The boys then fled from the premises, and Mr. Vansickle told Mr. Jagers, "I think I killed that man." Mr. Byrd died as a result of the stabbing.

On April 25, 2007, the trial court entered an order granting the State's motion to reopen the juvenile transfer hearing, which provided:

Now on this 24th day of April, 2007, comes on for consideration the motion of the State to reopen the juvenile transfer hearing for supplemental testimony. From a consideration of the pleadings, statements of counsel, together with other things,

matters, and proof before the court, the COURT FINDS AND ORDERS AS FOLLOWS:

1. The court, finding no prejudice to the defendant, finds that the State's motion is meritorious and should be granted.
2. Taking into consideration the testimony of Jacob Jagers on April 24, 2007, the court supplements its order of April 12, 2007, wherein the court denied the defendant's Motion to Transfer to Juvenile Court, in the following particulars:
  - A. With respect to factor number one as stated in Ark. Code Ann. 9-27-318(g), the court finds that the State has conclusively established the seriousness of the alleged offense and that the protection of society requires prosecution in the Criminal Division of this court;
  - B. With respect to factor number two, the court finds that the offense was committed in an aggressive, violent, and willful manner;
  - C. With respect to factor number three, the court finds the offense was committed against a person and that death resulted as result of the offense;
  - D. With respect to factor number four, the testimony of Jake Jagers was that the defendant herein, who was juvenile at the time of the offense, participated in the alleged offense of murder.
3. In all other respects, this court's order of April 12, 2007 shall remain in full force and effect.

On June 4, 2007, Mr. Vansickle filed an amended notice of appeal, attempting to appeal from the supplemental order, but this notice of appeal was untimely because it was not filed within thirty days of the order being appealed from. *See* Ark. R. App. P. - Crim. 2(b)(2).

On appeal, Mr. Vansickle argues that the trial court erred in denying his motion to transfer to juvenile court. He contends that such a transfer was warranted under extended juvenile jurisdiction.

A prosecuting attorney may, in his discretion, charge a juvenile who is at least sixteen years old in the criminal division of circuit court if the juvenile engages in conduct that, if

committed by an adult, would be any felony. Ark. Code Ann. § 9-27-318(c)(1) (Supp. 2007). On the motion of the court or any party, the court in which the criminal charges have been filed shall conduct a hearing to determine whether to retain jurisdiction or to transfer the case to another division of circuit court. Ark. Code Ann. § 9-27-318(e) (Supp. 2007). The court shall order the case transferred to another division of circuit court only upon a finding by clear and convincing evidence that the case should be transferred. Ark. Code Ann. § 9-27-318(h)(2) (Supp. 2007). Clear and convincing evidence is the degree of proof that will produce in the trier of fact a firm conviction as to the allegation sought to be established. *Richardson v. State*, 97 Ark. App. 52, \_\_ S.W.3d \_\_ (2006). We will not reverse a trial court's determination of whether to transfer a case unless that decision is clearly erroneous. *Id.* In the transfer hearing, the court must consider all of the following factors set forth in Ark. Code Ann. § 9-27-318(g) (Supp. 2007):

- (1) The seriousness of the alleged offense and whether the protection of society requires prosecution in the criminal division of circuit court;
- (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
- (3) Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;
- (4) The culpability of the juvenile, including the level of planning and participation in the alleged offense;
- (5) The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;
- (6) The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;

(7) Whether there are facilities or programs available to the judge of the juvenile division of circuit court that are likely to rehabilitate the juvenile before the expiration of the juvenile's twenty-first birthday;

(8) Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;

(9) Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and

(10) Any other factors deemed relevant by the judge.

In support of his argument that the trial court clearly erred in retaining jurisdiction, Mr. Vansickle relies on *Thompson v. State*, 330 Ark. 746, 957 S.W.2d 1 (1998). In that case, the supreme court held that while a juvenile may be tried as an adult solely upon the serious and violent nature of the offense, the trial court may not rely only on the allegations contained in the information; there must be a meaningful hearing where some evidence is presented to substantiate the serious and violent nature of the charges. Mr. Vansickle correctly asserts that at the transfer hearing held April 12, 2007, there was no proof offered by the State to substantiate its allegation that appellant committed capital murder. Mr. Vansickle contends that the only evidence produced by the State at that hearing was a prior conviction for public intoxication, and under such circumstances a transfer to the juvenile division was required. Mr. Vansickle concedes that the subsequent testimony by Mr. Jagers at the April 24, 2007, hearing, was sufficient to satisfy the requirements of *Thompson, supra*. However, he contends that this evidence was not before the trial court at the initial hearing, upon which it based its decision, and that he was denied a meaningful hearing as required by the supreme court's decision in *Thompson*. Mr. Vansickle submits that the subsequent hearing was after he had initiated his interlocutory appeal, and should not be considered by this court on appeal.

Our supreme court has held that even after the enactment of the EJJ legislation, a juvenile may still be tried as an adult solely because of the serious and violent nature of the offense. *See Otis v. State*, 355 Ark. 590, 142 S.W.3d 615 (2004). The trial court's April 25, 2007, order, that supplements its previous order, made sufficient findings to retain jurisdiction based on the State's proof that the offense was committed in violent manner, resulting in the death of the victim. Because Mr. Vansickle did not timely appeal from that order, we lack jurisdiction.

The supreme court has recently held that a notice of appeal must designate the order appealed from and be filed within thirty days of that order. *Wright v. State*, 359 Ark. 418, 198 S.W.3d 537 (2004). An order not mentioned in the notice of appeal is not properly before an appellate court. *Id.* In addition, the supreme court has held that if an appellant wishes to appeal an adverse ruling on a posttrial motion and the appellant has previously filed a notice of appeal of the judgment, the appellant must file a notice of appeal regarding the ruling on the motion within the time provided in Ark. R. App. P. - Crim. 2. *Id.* The timely filing of a notice of appeal is, and has always been, jurisdictional. *LaRue v. LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980). Mr. Vansickle's failure to timely file an amended notice of appeal regarding the trial court's supplemental order granting the State's posttrial motion, as required by Ark. R. App. P. - Crim. 2(b)(2), means that he has only appealed from the order filed April 17, 2007. Accordingly, Mr. Vansickle's appeal is not properly before this court.

Finally, we note that even had appellant taken a timely appeal, he could not be heard to complain about the subsequent hearing or supplemental order of the trial court, because

he failed to object to the State's motion to reopen the case. Contrary to appellant's argument, he received a meaningful hearing where the State offered testimony about the alleged murder, and Mr. Vansickle fully cross-examined the witness. Mr. Vansickle did not object then, or at any other time, to reopening the case for consideration of the witness's testimony. An objection is required to preserve an issue for appeal. *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000). And in light of the testimony elicited at that hearing, the trial court's decision to deny appellant's motion to transfer was not clearly erroneous.

Appeal dismissed.

HART and MILLER, JJ., agree.